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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1292

BUILDING AND CONSTRUCTION TRADES COUNCIL OF NEW ORLEANS, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Building and Construction Trades Council of New Orleans, AFL-CIO, respectfully prays that a writ of certiorari issue to review the opinion and decree of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on December 4, 1967, and December 27, 1967, respectively.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (one judge concurring specially and one judge dissenting) is reproduced in Appendix A to this petition, and is re-

ported at 387 F. 2d 79. The Decision and Order of the National Labor Relations Board (R. 28-115)[1], including the majority and dissenting opinions, is reproduced in Appendix B to this petition and is reported at 155 NLRB 319.

Jurisdiction

The opinion of the Court of Appeals was entered on December 4, 1967, and the decree on December 27, 1967. On February 20, 1968, Mr. Justice Black entered an Order extending the time for filing a petition for a writ of certiorari until April 4, 1968. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

Question Presented

Whether lawful primary picketing of a construction site by a union, in furtherance of its primary dispute with a general contractor, is converted into a secondary boycott prohibited by Section 8(b)(4)(i)(ii)(B) of the National Labor Relations Act when the general contractor establishes reserved gates for the exclusive use of subcontractors and the picketing continues at such gates.

Statute Involved

This case involves Sections 8(b)(4)(i)(ii)(B) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. § 151 et seq.). This section is reprinted in Appendix C hereto.

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[1] References to Volume I of the Transcript of Record printed pursuant to Rule 38 of the Court below (and designated in the same manner in this Court) are designated by the appropriate page number in that Volume, preceded by "R." References to portions of the testimony and exhibits printed as the joint appendix below (and designated in this Court as Transcript of Record, Volume II) are designated by the appropriate page numbers in the joint appendix, preceded by "App."

Statement of the Case

A. *Facts of the Dispute.*

The site of the dispute was a project for expanding the filtration plant of the East Jefferson Water Works, District No. 1, in Jefferson Parish, Louisiana (App. 3). Markwell, a Tennessee corporation with its principal office and place of business in the State of Tennessee, was selected as general contractor for the project (App. 7, 37).

Markwell decided to perform most of the work on the project with its own employees and to subcontract the remainder of the work for which it held the contract with the owner (App. 46, 50, 56). The functions Markwell intended to perform included excavation, concrete work, placement of iron and structural steel, process piping and mechanical work—comprising approximately eighty per cent of the total job (App. 50, 56). Subcontracts were let by Markwell to Binnings Construction Company, Inc. ("Binnings") for pile-driving work totaling $54,000 (App. 30), and Walter J. Barnes Electrical Company ("Barnes"), for electrical work totaling $226,000 (App. 23).

Notwithstanding these subcontracts, full responsibility for the satisfactory completion of the project rested with Markwell (App. 54). Markwell's project engineer and superintendent were to work closely with the subcontractors to insure that Markwell's commitment to the owner was performed in compliance with project specifications (App. 51, 53). On the job, Markwell and its subcontractors worked "together in concert with one another" (App. 28, 29, 52).

Markwell's operations could not go forward until the electrical work and pile-driving to be done by Barnes and Binnings were completed. When Barnes could not perform his electrical work, Markwell's superintendent found "it was holding him up" (App. 26). When Binnings was unable to complete the pile-driving work, Markwell's own em-

ployees stepped in and performed this function, using Binnings' own equipment (App. 31, 44).

Both Barnes and Binnings employed members of AFL-CIO craft unions affiliated with the New Orleans Building and Construction Trades Council (hereinafter, the "Council" (App. 9). Markwell's own employees worked under a contract between the company and a local of District 50 of the United Mine Workers of America, a labor organization not affiliated with the Council (App. 16). It appears that the wage scales provided for in the District 50 contract (R. 45, 60-62) were lower than the wage rates of the unions affiliated with the Council then prevailing in the New Orleans area for comparable work (App. 16-18, 77).

On October 17, 1963, Council representatives placed a single picket at one of the four gates in the chain link fence enclosing the filtration expansion project (App. 4, 37). He carried a sign with the following legend:

> "The wage rates on this job should be as posted: "Workers $4.05 per hour; boilermakers $4.00 per hour; bricklayers $4.00 per hour; carpenters, $3.62; cement masons $3.45; electricians $4.25; elevator constructors $3.96; glassworkers $3.52½; hod carriers $2.18; iron workers $3.52½; laborers $2.101 [*sic*]; lathers $3.56; millwrights $3.90½; painters $3.17; pile drivers $3.62; plasterers $3.58½; pipe fitters $4.05; plumbers $4.05; rod men $3.67; roofers $3.55; sheet metal workers $3.63½; tile layers $3.45; operating engineers $3.77½.
>
> "Markwell & Hartz, general contractors, does not have a signed agreement with the Bldg. and Const. Trades Council of New Orleans. AFL-CIO." (App. 77; see also App. 65)

When the picket appeared, Barnes' and Binnings' employees walked off the job (App. 24, 31). Markwell there-

upon took action[2] to readjust the flow of traffic through the various gates on the job (App. 38, 43, 45, 56, 68, 69):

On October 23, 1963, Markwell posted signs on all but one of the entrances to the job site stating that the gates involved had been reserved and set aside for employees of Markwell's subcontractors, suppliers, and motor freight lines, and that Markwell's own employees were not to use them (App. 38).[3] On the remaining gate, a sign was posted stating that it was to be used by Markwell employees only (App. 38). Some of these gate signs were amended on November 14, 1963, to bar Markwell suppliers' and carriers' employees from the gates being used by subcontractors' employees (App. 45), although the signs on other gates were not correspondingly adjusted at that time (App. 46). It was not until November 16, 1963, that carriers and suppliers were barred from all gates being used by subcontractors' employees (App. 45, 68), and it was not until December 6, 1963, that Markwell had brought all the various gates and signs into accord with each other (App. 69). On that date, a single gate had been marked as reserved for use by employees of Markwell and his job site suppliers and truck lines (App. 69).

While Binnings and Barnes employees refused to work on the filtration plant expansion project during the period that picketing was underway, at no time did the picketing or any other union action affect Barnes or Binnings operations other than those related to the Markwell subcontracts. Thus, when Binnings had to remove some equipment

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[2] While the premises upon which the construction work was going forward was owned by Jefferson Parish (App. 54), no question was raised as to Markwell's authority to "post" the various job site entrances in any manner it thought appropriate.

[3] On October 23, 1963, at the same time that the first adjustment in the gate signs was made, Markwell withdrew its employees from the job for a 24-hour period "in an effort to expedite pile-driving work on this project * * *" (App. 42, 43).

on the Markwell job for use on another project, the removal went forward without delay notwithstanding the picketing (App. 31). Similarily Barnes' employees worked on the Water Works premises on an electrical job not related to the Markwell contract while the picket was posted (App. 27).

B. *The Board's Decision*

The Board majority held that the picketing engaged in by the Council at the subcontractors' gates was lawful primary action prior to November 16, as it was on that date that the subcontractors' gates were first marked to preclude use by persons making deliveries to Markwell (R. 92-93, fn. 23). It recognized that a "common situs" problem was presented by the events at the subcontractors' gates prior to November 16 but rationalized the result as "respecting the traditional right of labor organizations to appeal to such delivery men" (R. 93).

The Board majority held that the picketing became a secondary boycott from and after November 16 on the basis of the *Moore Dry Dock*[4] rules. In response to the contention that the picketing continued to be primary after November 16 because the work of the subcontractors was related to the normal operations of Markwell under the *General Electric* and *Carrier* decisions of this Court,[5] the majority ruled that those decisions were "inapposite."[6] No reasons were given for this conclusion based on fact or

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[4] *Sailors Union of the Pacific*, 92 NLRB 547.

[5] *Local 761, Electrical Workers* v. *NLRB (General Electric)*, 366 U.S. 667 (1961); *United Steelworkers* v. *NLRB (Carrier)*, 376 U.S. 492 (1964).

[6] The refusal by the Board majority to apply the *General Electric* and *Carrier* related work tests in the instant case has been widely criticized in legal commentaries. See 65 Mich. L. Rev. 212, at 217, 218-19 (1966); 44 Texas L. Rev. 794, 795-97 (1966); 20 Sw. L. J. 815, 830 (1966); 54 Geo. L. J. 962, 975 (1966).

the statute except for the statement that the Board had "traditionally" distinguished between picketing at the premises of a "struck manufacturer" and picketing at a so-called "common situs" as here where "the primary employer was but one of several employers operating on premises owned and operated by a third party, the Jefferson Parish Water Works" (R. 86).

In a second *Markwell and Hartz* case, *Nashville Building and Construction Trades Council,* 164 NLRB No. 50, 65 LRRM 1149, enfd. 383 F. 2d 562 (6th Cir. 1967), the Board made it explicit that its previous decision in the New Orleans case was based on the proposition that the legality of picketing at a common situs in the construction industry is not to be determined by the "special guidelines" laid down by the Supreme Court in *General Electric.* The majority in this case rejected the position of the dissenters that application of *General Electric* and *Carrier* would not require a reversal of the *Denver Building and Construction Trades Council* case[7] by stating that the theory of the dissent "if logically extended" would require such reversal.

The two dissenting members took sharp exception to the holding of the majority, stating in part as follows:

> "As we believe, for reason stated below, that the Court in those decisions [*General Electric* and *Carrier*] applied principles of general application, we dissent from the majority's conclusion that the tests announced in *General Electric* for determining whether appeals to employees of neutral contractors constitute legitimate primary activity are not applicable to the building and construction industry." (R. 100)

The dissenters further objected to the effect of the distinction drawn by the majority between the construction

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[7] *NLRB v. Denver Building and Trades Council,* 341 U.S. 675.

industry and all others, which would permit an employer in the former to designate or limit the places of primary activity against him, while employers in other industries would not be able to do so. Finally, the dissenters rejected the conclusion of the majority that this Court's decision in *Denver* precluded application of the *General Electric* related work test to this case, particularly where, as here, the dispute was with the general contractor rather than any of the subcontractors. Applying the related work test to the facts presented, the dissenters found that the work of the subcontractors, Binnings and Barnes, was related to Markwell's work on the job and its responsibility to complete the entire project, within the meaning of *General Electric.*

C. *The Court of Appeals' Decision.*

By a two to one vote, with three separate opinions, the Court of Appeals granted enforcement of the Board's order. Judge Connally, writing the Court's opinion, found —contrary to the view of the Board majority—that the related work test in *General Electric* and *Carrier* does apply to construction industry picketing. Ignoring the difference between "relatedness of work" and relationship of legal entities, however, he held that this Court's ruling in *Denver,* which was based on the independent legal status of the subcontractor, required affirmance of the Board's order. The specially concurring opinion of Judge Rives disagreed with Judge Connally on the point of work relationship and stated that "It seems to me that the work of the subcontractors Binning and Barnes was 'related to the normal operation' of the general contractor Markwell and Hartz, Inc. (M & H)." (App. A, *infra,* p. 9a) He concurred in the result, however, because he accepted the Board majority view that the related work test does not apply to common situs picketing in the construction industry.

The dissenting opinion of Judge Wisdom agreed with the

position of the Board dissenters that this Court did not intend in *General Electric* to distinguish between industries in the application of the related work test; rather, he found the test is one of general application to all industries, and would have remanded the case to the Board to decide whether the work of Binnings and Barnes was related to that of Markwell & Hartz.

Judge Wisdom considered the relationship between *Denver* and *General Electric* and *Carrier* as follows:

> "The Board assumes that if the related-work standard is applied to common construction situs, *General Electric* must be considered as having overruled *Denver sub silentio*. In *Denver*, however, the Court focused on the point that contractors and subcontractors on a construction project are not *necessarily* so interconnected that they should all be regarded as one entity. The Court did not hold that as a matter of law all independent contractors on a common situs must be considered as neutrals. In *General Electric* the Court accepted the *Denver* holding that subcontractors are separate legal entities and accepted the principle that the union may appeal to employees of a secondary employer. The Court then focused on the criteria for determining when and how the union may reach the employees of the secondary employer. The touchstone furnished by *Carrier* as well as by *General Electric* is relatedness of work. To the extent that the conclusions in *Denver* were arrived at independent of any consideration of relatedness, those conclusions must be considered as modified by application of the relatedness standard set down in *General Electric*. Here, therefore, the Board should have made a finding on the issue of relatedness. An unlawful object under Section 8(b)(4) cannot be inferred simply from the fact that the union has picketed at a gate reserved for the subcontractors' employees." (App. A, *infra*, p. 20a)

What emerges from the decision of the Court of Appeals is thus: (1) a lack of a majority rationale for its enforcement of the Board's Order; (2) two members of the Court actually agreeing with the Board dissenters that the related work test *is* applicable to construction industry picketing [8]; and (3) a serious disagreement between the three members of the Court, as existed between the five members of the Board, as to the interpretation to be placed upon this Court's decisions in *General Electric* and *Carrier* with respect to construction site picketing, as well as to the relationship between those decisions and the earlier ruling in *Denver*.

Reasons for Granting the Writ

I. Both the Court of Appeals and the Board have decided an important question of Federal law in a way in conflict with applicable decisions of this Court.

A. *General Electric and Carrier*

The basic issue presented by this petition is the meaning and scope of this Court's decision in *General Electric* and *Carrier, supra*. It is respectfully submitted that the combination of opinions which constitutes the majority decision of the Court below did not correctly apply or construe these decisions.

Judge Connally found no reason to limit *General Electric* and *Carrier* to the manufacturing industry and properly stated that:

> "The question posed here is whether the work of subcontractors Binnings and Barnes was 'related to the normal operation' of Markwell and Hartz (as, for ex-

[8] The U. S. Court of Appeals for the Sixth Circuit, in the *Nashville* case, *supra*, took the view that *General Electric* and *Carrier* do not apply to the construction industry. 383 F. 2d 562, 566. There was no explication of the Court's position on this point.

> ample, ordinary maintenance as in *General Electric*), in which event the picketing is primary; or whether it is unrelated to the normal operations (as 'of a capital improvement nature')." (App. A, *infra*, p. 6a)

He did not examine the work operations which Judge Rives in his special concurring opinion had determined to be "related," but rested his opinion on the legal relationship between the subcontractors and the general contractors. Obviously, such business relationships were not the key to the rulings in *General Electric* and *Carrier*. The building and construction trades contractors were separate and independent from General Electric Company. The railroad company was separate and independent from Carrier Company. It would thus appear that Judge Connally's opinion did not actually apply the "related work" tests of *General Electric* and *Carrier* to the instant case.

In his concurring opinion, Judge Rives agreed with the Board majority that there was a distinction between picketing at the premises of the primary employer and picketing at a common situs where two or more employers are performing separate tasks. He endeavored to find recognition of this distinction by this Court in its decisions in *General Electric* (citing 366 U.S. at 676-679) and *Carrier* (citing 376 U.S. at 497), adding that the latter continued to recognize the importance of the location of the picketing.

Petitioner submits that nothing in the portions of the *General Electric* and *Carrier* decisions relied upon by Judge Rives supports his conclusion. Indeed, in *Carrier*, the full statement referred to was as follows:

> "The location of the picketing, though important, *was not deemed of decisive significance;* picketing was not to be protected simply because it occurred at the site of the primary employer's plant. Neither, however, was all picketing forbidden where occurring at gates not used by primary employees. The legality of separate

> gate picketing depended upon the type of work being done by the employees who used that gate; . . ." 376 U.S. at 497 (Emphasis added.)

Nor does this Court's tracing of the history of the *Moore Dry Dock* doctrine, in *General Electric,* at 366 U.S. 676-679, indicate the claimed recognition of Judge Rives' distinction. It is to be noted, for example, that this Court described "common situs" cases as those "situations where two employers were performing separate tasks on common premises." (366 U.S. at 676-77). No distinction was drawn between such situations which occurred at the premises of the struck employer and those which did not. Further, with respect to the *Moore Dry Dock* case itself, Petitioner submits that this Court approved that doctrine as an illustration of the proposition that picketing could not be legally directed at employees of a secondary employer [Moore Dry Dock] whose work operations [ship conversion] at its premises [dry dock] were not related to the everyday operations [sailing a vessel] of the primary employer [Samsoc]. There is no indication in *General Electric* or *Carrier* that this result depended on the application of such descriptive terminology as "primary situs" or "common situs." On the contrary, the result flows from the lack of relationship between the work operations of the secondary employer and the everyday operations of the primary employer. In short, Judge Rives has misread the effect of this Court's opinion in *General Electric,* which is that the *Moore Dry Dock* rules are to be utilized when the work of the employers present at the common situs is unrelated, but that it has no application where their work is related:

> "Where the work done by the secondary employees is *unrelated* to the normal operations of the primary employer, it is difficult to perceive how the pressure of picketing the entire situs is any less on the neutral employer merely because the picketing takes place at

property owned by the struck employer. The application of the Dry Dock tests to limit the picketing effects to the employees of the employer against whom the dispute is directed carries out the 'dual Congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.' *N.L.R.B.*, v. *Denver Building and Construction Trades Council, supra* (341 U.S. at 692)." 366 U.S. at 679. (Emphasis added.)

A majority of the Board, whose decision was enforced by the Court of Appeals, similarly misconstrued and misapplied the *General Electric* and *Carrier* decisions in their attempt to limit the effect of those decisions to picketing which takes place at the premises of a manufacturer who is the primary employer in the labor dispute involved. Such a dispute, said the Board majority, does not involve a "common situs."

The principal basis on which the Board majority rested its primary situs-common situs distinction was its view that this Court had made an "'observation that the *General Electric* case did not present a common situs situation to which the *Moore Dry Dock* rule should apply." (R. 91) Petitioner submits that reference to the page of this Court's opinion in *Carrier* upon which the majority relies (376 U.S. at 497), to the succeeding pages of that opinion, to this Court's decision in *General Electric*, and to the Board's brief submitted to this Court in *General Electric*, reveal plainly that the Board majority has incorrectly interpreted this Court's decisions. This Court did not hold the *Moore Dry Dock* rules inapplicable in *General Electric* because a common situs situation was not presented; rather, the rules were held inapplicable because related work was involved.

The Board's position in *General Electric*, as stated in its

brief to this Court, did *not* contend that the *General Electric* case did not "present a common situs situation." On the contrary, the brief for the Board *equated* the common situs situation in the building and construction industry with the common situs situation in the *General Electric* case. The following statements in the Board's brief in the *General Electric* case set forth the facts which are a matter of common knowledge:

> "The situation here [GE] is substantially similar to that in *Denver* and *Electrical Workers,* pp. 17-18 *supra.* There, as here, the same premises were the regular work site for a number of different employers and their employees. . . .
>
> "*Denver* and *Electrical Workers* cannot be distinguished on the ground that the relationship between contractors on a building and construction project is materially different from that between General Electric and its contractors at Appliance Park. Petitioner says (Br. 57-58; see, also, *Amici* Br. 23) that in the building and construction situations the various contractors on the project are not doing work for each other but for some third person, whereas here the contractors are doing work directly for the primary employer, General Electric. But, considering the interdependence of the various crafts on the typical construction project, it is highly unrealistic to say that the work of one does not benefit or involve the others. For example, the electrical subcontractor may not be able to wire the building unless the carpenter subcontractor puts in studs; if the union has a dispute with the former and, in furtherance of its cause, strikes the latter, there has been an interruption of work which directly involves the primary employer to the same extent as here. The difference is that here the disruption has occurred on premises owned by the primary employer

whereas in the example given the premises are owned by a third party—a distinction which the union concedes is not material (Br. 91-92). Indeed, as the PBM case, discussed *supra*, p. 26, illustrates, where the primary dispute is with the general contractor who owns the land, and the union strikes his subcontractors, a situation identical to that presented here may arise in the building and construction situation." NLRB br., pp. 34-35.

Actually, this Court would have sustained the Board's decision holding the picketing unlawful if the factual assumption that the independent building and construction trades contractors were performing new construction work unrelated to the operations of the GE plant had proved true. (Later the Board, on remand, found the work of the independent contractors "related" to the operations of the plant.) In distinguishing the case of picketing of gates used by deliverymen, customers and replacement workers, this Court stated that: "The key to the problem is found in *the type of work* that is being performed by those who use the separate gate. It is significant that the Board has since applied its rationale first stated in the present case, only to situations where the independent workers were performing tasks *unconnected* to the normal operations of the struck employer—usually construction work on his buildings. In such situations, the individual limitations on picketing activity respect the balance of conflictng interests that Congress has required the Board to enforce." 366 U.S. at 680. (Emphasis added.) The remand was made to ascertain whether the reserved gate was used by employees of the independent contractors to perform *related* work.

Nowhere in the opinion did this Court take issue with the statement in the Board's brief describing the *General Electric* case as a common situs situation. The crucial legal

distinction was the relationship or lack of relationship of the work operations of the primary and secondary employer at the site of the primary labor dispute; *not* whether the site of the dispute could be described factually as a "common situs." The distinction proposed by the Board in the *General Electric* case between transitory appearance of the secondary employer's employees at the primary employer's place of work—as in the case of deliverymen—and their regular presence at such place—as in the *General Electric* case where the secondary building and construction trades employees had been working at the plant for as long as 6 years—was not accepted by this Court.

This Court's rejection of the Board's "primary situs-common situs" distinction is made even clearer by the analysis of its *General Electric* decision, which it set forth in its later decision in *Carrier:*

> "In the General Electric case, because the union's object was to enmesh 'employees of the neutral employers in its dispute' with the primary employer, the Board ordered the union to cease picketing a separate gate used exclusively by employees of certain independent contractors *who had been doing work on the primary premises on a regular and continuous basis for a considerable period of time.* 123 NLRB 1547. In this Court, the Board conceded that when the struck premises are occupied by the primary employer alone, the right of the union to engage in primary activity at it in connection with the primary premises may be given unlimited effect—'all union attempts, by picketing and allied means, to cut off deliveries, pickups, and employment at the primary employer's plant will be regarded as primary and outside the purview of Section 8(b)(4)(A).' But *the Board insisted that the facts presented a common situs problem since the regular work of the contractors was continuously done on*

the primary premises and hence the rules of the Moore Dry Dock case should be applied. The union, on the other hand, argued that no picketing at the primary premises should be considered as secondary activity.

"*The Court accepted the approach neither of the Board nor of the Union. The location of the picketing, though important, was not deemed of decisive significance;* picketing was not to be protected simply because it occurred at the site of the primary employer's plant. Neither, however, was all picketing forbidden where occurring at gates not used by primary employees. The legality of separate gate picketing depended upon the type of work being done by the employees who used that gate; if the duties of those employees were connected with the normal operations of the employer, picketing directed at them was protected primary activity, but if their work was unrelated to the day-to-day operation of the employer's plant, the picketing was an unfair labor practice. The order of the NLRB was vacated to permit determination of the case in accordance with the proper test.

"It seems clear that *the rejection of the Board's position in General Electric* leaves no room for the even narrower approach of the Court of Appeals in this case, which is that the picketing at the site of a strike could be directed at secondary employees only where incidental to appeals to primary employees." 376 U.S. at 497-498. (Emphasis added.)

It is respectfully submitted that the proposition which emerges from the *General Electric* and *Carrier* decisions is that Section 8(b)(4)(i) and (ii)(B) establishes a rule of law which allows the union to picket a primary employer at the premises he occupies and to include within the scope of such picketing the employees of other employers at such

premises *if* the operations of such other employers are related to the operations of the primary employer. The primary employer cannot avoid the rule by establishing a reserved gate for the entrance of employees of other employers at the premises of the primary employer, whether such employees are engaged in the transitory function of delivery or a regular and continuous function such as conventional maintenance.[9]

The central error of the Board's majority opinion is well described by the two dissenting members as follows:

> "In our view, the majority has inferred that Respondent's picketing was for an unlawful object simply from the fact that the reserved gates were used only by secondary employees, *without inquiry* into the question of whether the appeals to such employees, were, in the circumstances of this case, permissible primary activity, an inquiry which we believe is required by the Supreme Court's decisions in *General Electric* and *Carrier Corp.*" R. 100. (Emphasis added.)

As stated by Judge Wisdom, dissenting below: "There is nothing in *General Electric* or *Carrier* to suggest that

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[9] The Court also ruled that primary picketing which properly includes employees of secondary employers at the situs cannot be converted into secondary picketing by device. Thus, the removal by the employer of all the primary employees from the premises is not effective to convert the allowable picketing into prohibited secondary activity. *Local 618, Automotive Employees* v. *NLRB (Site Oil)*, 249 F. 2d 332 (8th Cir. 1957); *Seafarers' Union* v. *NLRB (Salt Dome)*, 265 F. 2d 585 (DC Cir. 1959). The establishment of a separate gate for deliveries cannot accomplish such an object. *General Electric*, 366 U.S. at 680. Nor can this result be achieved through the medium of a separate gate for employees of independent contractors engaged in the performance of "related" work. See *Kaynard* v. *Local 282, Teamsters*, 200 F. Supp. 505 (DCED NY, 1962). Yet this last device is exactly what the Board majority opinion seeks to validate.

Note in this regard the Board majority's variant treatment of the picketing at October 23, during the period prior to November 16, and after November 16, each of which reflect the illustrations listed in this footnote.

the construction industry should be treated differently from any other industry [with respect to the application of the tests of those cases]." (App. A, at p. 21a, *infra.*) The direct answer to the Board's arbitrary distinction between manufacturing and construction is to be found in its own factual representations to this Court in *General Electric* that the situation in *General Electric* "is substantially similar" to that of a building and construction project (NLRB br., p. 34). In the Board's language:

> "*There* [the building and construction project], *as here,* [G.E. Appliance Park] *the same premises were the regular work site for a number of different employers and employees.*
>
> * * *
>
> "*Denver* and *Electrical Workers* cannot be distinguished on the ground that the relationship between contractors on a building and construction project is materially different from that between General Electric and its contractors at Appliance Park." *Ibid.* (Emphasis added.)[10]

These statements of the Board raise serious questions as to the validity of its claim that the instant decision was required by its "traditional" views "over the years" (R. 86, 87). It is respectfully submitted that, even if the claim is factually correct, recourse to the *ipse dixit* of Board "traditions" is no substitute for proper construction and application of the statute. In this regard it may be noted that this Court struck down the Board's erroneous interpretation of Section 10(k) of the Act notwithstanding the Board's practice of fourteen years in misapplying that

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[10] Therefore, for the reasons once acknowledged before this Court, the Board may not now allow Markwell and Hartz to insulate itself from picketing throughout the construction site by subcontracting some of its work and posting signs at various gates, any more than General Electric could have insulated itself by subcontracting the wiring of its refrigerators to an independent contractor on its own premises and restricting the entry of its subcontractor's employees and suppliers to a single gate.

section of the Act. *NLRB* v. *Radio & Television Broadcast Engineers, (C.B.S.)*, 364 U.S. 573 (1961).

B. *Denver.*

The Board majority sought to avoid the clear rule of *General Electric* by stating that its acceptance of the dissent, "if logically extended," would mean that *NLRB* v. *Denver Building and Construction Trades Council,* 341 U.S. 675 (1951), had been overruled *sub silentio.* It is respectfully submitted that a reversal of the Board's decision and order in this case would not involve a reversal of the decision in *Denver.*

The issues in the *Denver* case are different from the issues in the instant case. In *Denver,* a general contractor for the construction of a building let a sub-contract for electrical work to Gould & Preisner, a nonunion employer. The union thereupon picketed the project with a sign stating: "This Job Unfair to Denver Building and Construction Trades Council," and all employees of employers other than Gould & Preisner left the job. The general contractor then removed Gould & Preisner so that the union employees would return to work. It is to be noted that there were no separate gates involved in the case.

The Supreme Court examined the record with respect to the Board's finding:

> "That *an* object, if not the only object of what transpired with respect to . . . Doose and Lintner [union general contractor] was to force or require them to cease doing business with Gould & Preisner [non-union electrical subcontractor] seems scarcely open to question, in view of all of the facts. And it is clear at least as to Doose and Lintner, that that purpose was achieved." 82 NLRB, at 121. (Emphasis added.)

The Court contrasted *Rice Milling,* where the picketing union "sought merely to obtain its own recognition" by

the primary employer who operated the mill. It deemed the union appeal to the two employees of the secondary employer (an independent company which was a customer for the mill's products), who drove a truck to the mill, as included within the permissible limits of a "primary strike."

In reviewing the record in *Denver* the Court conceded that:

> "If there had been no contract between Doose & Lintner and Gould & Preisner there might be substance in their [*i.e.*, Union] contention that the dispute involved no boycott. If, for example, Doose & Lintner had been doing all the electrical work on this project through its own non-union employees, it could have replaced them with union men and thus disposed of the dispute. However, the existence of the Gould & Preisner subcontract presented a materially different situation. The non-union employees were employees of Gould & Preisner. The *only way* that respondent could attain *their purpose was to force Gould & Preisner itself off the job. This, in turn, could be done only through Doose & Lintner's termination of Gould & Preisner's subcontract.* The result is that the Council's strike, in order to attain its ultimate purpose, must have included among its objects that of forcing Doose & Lintner to terminate that subcontract. . . . It was an object of the strike to force the contractor to terminate Gould & Preisner's subcontract." 341 U.S. at 688-689. (Emphasis added.)

In the instant case, the objective of the picketing union was to raise the wages of the general contractor's employees to the area standards.[11]

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[11] "Area standards" picketing has been held to be lawful primary activity. *Houston Building and Construction Trades Council (Claude Everett Const. Co.)*, 136 NLRB 321 (1962).

Actually, the Board majority recognized that the union was engaged in a primary labor dispute in its statement of the question in the case as follows:

> ". . . we are asked to decide whether a union, in furtherance of a *primary dispute* with a general contractor in the construction industry, may lawfully engage in jobsite picketing at gates reserved and set apart for exclusive use of neutral subcontractors." R. 84. (Emphasis added.)

The Board majority acted upon this view when it ruled that the picketing on October 23, when Markwell withdrew all its employees for a 24-hour period, "did not evidence a departure from what at that time constituted lawful primary action." (R 93, fn. 22).[12]

Even more significantly, the Board majority held lawful the Council's picketing of the reserved gates prior to November 16 because during such period these gates were reserved not only for subcontractor's employees but also for employees of suppliers and carriers. The majority avoided the *General Electric* and *Carrier* rule of law which clearly required this result, and sought its justification in its undefined authority to "balance . . . competing interests."

A fortiori, the Board could not have held the picketing unlawful prior to the establishment of any reserved gates. In this material respect, the instant case differs from

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[12] Markwell's petition to review the Board's order in this case was based on the Board's "refusing to sustain in all respects the complaint of the General Counsel predicated on the charge filed by petitioner, whereby petitioner is aggrieved" (R. 8). Since the complaint of the General Counsel alleged violations dating from "on or about October 23, 1963," (R. 28), whereas the Board found violations only after November 16, 1963 (R. 92-93, f.n. 22), it is assumed that the Board's finding the picketing legal prior to November 16 was the basis for Markwell's alleged aggrievement. The Court below affirmed this part of the Board's order.

Denver, where the picketing was held unlawful even though there were no reserved gates.

The legal question in the instant case thus narrows itself down to the issue of whether primary picketing of a general contractor at a "common situs", which is lawful even when maintained at gates reserved for both carriers and subcontractors (or *a fortiori* at gates reserved for carriers alone), becomes unlawful secondary picketing when the general contractor reserves the gates solely for subcontractors doing work related to the normal operations of the general contractor.

The Board majority's refusal to equate the legal effect of the "related" work of the subcontractor's employees with the "related" work of the carriers' employees flies straight in the face of the holding of this Court in *General Electric* and the following language in *Carrier:*

> "The primary strike, which is protected by the proviso, is aimed at applying economic pressure by halting the day-to-day operations of the struck employer. But Congress not only preserved the right to strike; it also saved 'primary picketing' from the secondary ban. Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at all those approaching the situs whose mission *is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt.*" 376 U.S. at 499. (Emphasis added.)

Certainly there is nothing in the 1951 decision of this Court in *Denver* which requires or authorizes the Board's erroneous reading of the *General Electric* (1961) and *Carrier* (1964) decisions for the purpose of preserving its discriminatory "common situs" policy.[13]

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[13] 65 Mich. L. Rev. 212, at 219; 20 Sw. L. J. 815, at 835; 54 Geo. L. J. 962, at 976.

In this connection, it should be noted that the Board majority recognized that, in accordance with its terminology, "a common situs problem is presented" where a gate is reserved for employees of subcontractors and deliverymen (R. 92-93, fn. 22). The dilemma thus created by the majority's approach was resolved by it, as pointed out above, by utilizing the so-called "balancing" power of the Board. It is respectfully submitted that, although the legal interpretations of an agency administering a statute are entitled to weight, there is nothing in *General Electric* and *Carrier* which recognizes a roving commission in the Board to "balance" as the method for distinguishing between lawful primary picketing and unlawful secondary picketing.

II. The question presented by the Petition is one of major significance in the administration of the National Labor Relations Act and affects fundamental rights of organized labor in the building and construction industry.

The issue presented is significant because, simply stated, what results from the *Markwell & Hartz* doctrine of the Board majority, enforced by the Court below, is the serious and unwarranted dimunition of the right of building and construction trades unions and their 3½ million members to engage in primary picketing. This Court has taken special note of the Congressional intention to safeguard the fundamental right of primary picketing. (See *Carrier*, 376 U.S. at 499; *supra* at page 23.)

Legal commentators have noted that the arbitrary discrimination against building and construction trades unions resulting from the *Markwell & Hartz* doctrine will have the practical effect of extinguishing their right to engage in primary picketing:

> "The Board's decision in the instant case results in more rigid standards for common-situs picketing in

the construction industry than for reserved-gate picketing in the manufacturing industry. The same picketing that may be lawful at a construction site where there is no reserved gate, becomes unlawful when conducted at a reserved gate. Thus any general contractor wishing to lessen the effects of construction-site picketing need only set up separate gates for use by the neutral subcontractors. This distinction seems difficult to justify since the adverse effects of reserved-gate picketing on neutral secondary employers are the same whether experienced at a construction site or manufacturing plant; the union employees of the secondary employer are likely to honor the picket line in both instances. 44 Texas L. Rev. 794, 798.

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"By setting aside reserved gates, contractors at a construction site will be able to render ineffective almost any union picketing—a luxury not afforded employers in the manufacturing industry." 54 Geo. L. J. 962, at 976.

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"The *Markwell & Hartz* decision seems to stifle completely any union attempt to picket at a construction site. Any informed employer will know to utilize separate gates to indicate a violation of the *Dry Dock* rules. . . . *Markwell & Hartz* is the most stringent measure ever taken to control union picketing at a construction site, surpassing even *Washington Coca Cola.*" 20 Sw. L. J. 815, 833.

The significance of this issue in the administration of the Act may be ascertained from the high percentage of § 8(b)(4)(B) cases which arise in the building and con-

struction industry. Thus, of a total of 1,206 "CC" [14] cases received by the Board in fiscal year 1966, 653 were in the construction industry. The next largest group was for all manufacturing industries, and even though these combined industries employ many more millions of employees than are engaged in the construction industry, only 255 such cases arose in that group.

Thus, the importance of the issue presented, the conflict between the ruling of the majority of the Board and the Court below with applicable decisions of this Court, and the deep division within both the Federal Agency empowered to administer the statute and the reviewing Court below concerning the standards to be applied to picketing of reserved gates at construction sites, are compelling reasons for the granting of review by this Court.

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[14] Thirty-First Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1966, U. S. Gov't. Printing Office, 1967, Appendix A, Table 5, pp. 192-193.

"CC" cases are those arising under Sections 8(b)(4)(A), (B) and (C) of the Act, of which, in fiscal 1966, 8(b)(4)(B) charges—the section here involved—represented over 80 per cent of such cases. Board Annual Report, 1966, *supra*, at Appendix A, Table 2, p. 186.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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